

SENATE JUDICIARY COMMITTEE SUBSTITUTE FOR  
SENATE BILL 449

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

AN ACT

RELATING TO HOME LOANS; ENACTING THE HOME LOAN PROTECTION ACT;  
PROHIBITING CERTAIN PRACTICES BY CREDITORS; PROVIDING CIVIL  
REMEDIES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. NEW MATERIAL SHORT TITLE. -- Sections 1  
through 14 of this act may be cited as the "Home Loan  
Protection Act".

Section 2. NEW MATERIAL FINDINGS. -- The legislature  
finds that:

A. abusive mortgage lending has become an  
increasing problem in New Mexico, exacerbating the loss of  
equity in homes and causing the number of foreclosures to  
increase in recent years;

B. one of the most common forms of abusive lending

1 is the making of loans that are equity-based, rather than  
2 income-based;

3 C. the financing of points and fees in these loans  
4 provides immediate income to the originator and encourages  
5 creditors to repeatedly refinance home loans; and

6 D. while the marketplace appears to operate  
7 effectively for conventional mortgages, too many homeowners  
8 find themselves victims of overreaching creditors who provide  
9 loans with high costs and terms that are unnecessary to secure  
10 repayment of the loan.

11 Section 3. [NEW MATERIAL] DEFINITIONS. --As used in the  
12 Home Loan Protection Act:

13 A. "bona fide discount points" means loan discount  
14 points that are knowingly paid by the borrower for the express  
15 purpose of reducing, and which in fact do result in a bona fide  
16 reduction of, the annual percentage rate otherwise applicable  
17 to the home loan; provided, however that discount points are  
18 not "bona fide discount points" if the annual percentage rate  
19 otherwise applicable to the home loan exceeds the conventional  
20 mortgage rate by more than:

21 (1) one and one-half percentage points for a  
22 home loan secured by a first lien; or

23 (2) three percentage points for a home loan  
24 secured by a junior lien;

25 B. "borrower" means a natural person obligated to

1 repay a home loan, including a co-borrower, cosigner or  
2 guarantor;

3 C. "bridge loan" means a loan for the initial  
4 construction of a borrower's principal dwelling on land owned  
5 by the borrower with a maturity of less than eighteen months  
6 that only requires the payment of interest until the entire  
7 unpaid balance is due and payable;

8 D. "conventional mortgage rate" means the most  
9 recently published annual yield on conventional mortgages  
10 published by the board of governors of the federal reserve  
11 system as of the fifteenth day of the month immediately  
12 preceding the month in which the application for the extension  
13 of credit is received by the creditor;

14 E. "creditor" means a person who makes a home loan;

15 F. "high-cost home loan" means a home loan in  
16 which:

17 (1) the contract rate exceeds the rates  
18 threshold; or

19 (2) the total points and fees exceed the total  
20 points and fees threshold;

21 G. "home loan" means a loan, including an open-end  
22 credit plan, other than a reverse mortgage transaction or a  
23 bridge loan, where the loan is secured by:

24 (1) a mortgage or deed of trust on real estate  
25 in this state upon which there is located or there is to be

. 146755. 1

1 located a structure:

2 (a) designed principally for occupancy  
3 by one to four families; and

4 (b) that is or will be occupied by a  
5 borrower as the borrower's principal residence; or

6 (2) a security interest on a manufactured home  
7 that is or will be occupied by a borrower as the borrower's  
8 principal residence;

9 H. "manufactured home" means a structure,  
10 transportable in one or more sections, which in the traveling  
11 mode is eight body feet or more in width or forty body feet or  
12 more in length or, when erected on site is three hundred twenty  
13 or more square feet and which is built on a permanent chassis  
14 and designed to be used as a dwelling with a permanent  
15 foundation when erected on land secured in conjunction with the  
16 real property on which the manufactured home is located and  
17 connected to the required utilities and includes the plumbing,  
18 heating, air conditioning and electrical systems contained  
19 therein. "Manufactured home" includes any structure that meets  
20 all the requirements of this subsection except the size  
21 requirements and with respect to which the manufacturer  
22 voluntarily files a certification required by the secretary of  
23 the United States department of housing and urban development  
24 and complies with the standards established under the federal  
25 National Manufactured Housing Construction and Safety Standards

. 146755. 1

1 Act of 1974. "Manufactured home" does not include rental  
2 property or second homes or manufactured homes when not secured  
3 in conjunction with the real property on which the manufactured  
4 home is located;

5 I. "points and fees" means:

6 (1) all amounts payable by a borrower at or  
7 before the closing of a home loan, exclusive of any time-price  
8 differential due at closing on the loan proceeds, including:

9 (a) loan discount points or other  
10 discounts;

11 (b) loan fees, finder's fees or similar  
12 charges;

13 (c) fees for preparation of loan-related  
14 documents; and

15 (d) all compensation paid directly or  
16 indirectly to a mortgage broker, including a broker that  
17 originates a loan in its own name in a table-funded  
18 transaction; but does not include fees for the following  
19 purposes, if the amounts are bona fide and reasonable and paid  
20 to a person other than the creditor or an affiliate of the  
21 creditor: 1) service or carrying charges; 2) credit reports;  
22 3) title exam, title insurance or similar purposes; 4) escrow  
23 charges for future payments of taxes and insurance; 5) fees for  
24 notarizing deeds and other documents; 6) appraisals, including  
25 fees related to any pest infestation or flood hazard

. 146755. 1

1 inspections conducted prior to closing; 7) inspection performed  
2 prior to closing; 8) attorney fees, if the borrower has the  
3 right to select the attorney from an approved list or  
4 otherwise; 9) fire and hazard insurance and flood insurance  
5 premiums if the conditions in 12 C.F.R. s. 226.4(d)(2) are met;  
6 10) tax payment services; 11) surveys; 12) flood certification;  
7 and 13) pest infestation and flood determination;

8 (2) the maximum prepayment fees and penalties  
9 that may be charged or collected under the terms of the loan  
10 documents;

11 (3) all prepayment fees or penalties that are  
12 incurred by the borrower if the loan refinances a previous loan  
13 made or currently held by the same creditor or an affiliate of  
14 the creditor;

15 (4) the cost of all premiums financed by the  
16 creditor, directly or indirectly, for any credit life, credit  
17 disability, credit unemployment or credit property insurance,  
18 or any other life or health insurance, or any payments financed  
19 by the creditor, directly or indirectly, for any debt  
20 cancellation or suspension agreement or contract, except that  
21 insurance premiums calculated and paid on a monthly basis shall  
22 not be considered financed by the creditor; and

23 (5) for open-end loans, the points and fees  
24 included in Paragraph (1) of this subsection that are known at  
25 or before closing plus the minimum additional fees the borrower

1 would be required to pay to draw down an amount equal to the  
2 total credit line;

3 J. "rate threshold" means:

4 (1) for a first lien mortgage home loan, an  
5 interest rate equal to seven percentage points over the weekly  
6 average yield on comparable United States treasury securities  
7 on the fifteenth day of the month immediately preceding the  
8 month in which the loan is made; and

9 (2) for a subordinate mortgage lien, an  
10 interest rate equal to nine percentage points over the weekly  
11 average yield on comparable United States treasury securities  
12 on the fifteenth day of the month immediately preceding the  
13 month in which the loan is made;

14 K. "total points and fees" means the result  
15 obtained by subtracting the bona fide discount points paid from  
16 the sum of the points and fees, except that if the number of  
17 bona fide discount points paid exceeds two points, then only  
18 the amount that represents two bona fide discount points shall  
19 be subtracted; and

20 L. "total points and fees threshold" means:

21 (1) for a home loan in which the total  
22 principal loan amount is twenty thousand dollars (\$20,000) or  
23 more, an amount equal to five percent of the total principal  
24 loan amount; and

25 (2) for a home loan in which the total

. 146755. 1

underscored material = new  
[bracketed material] = delete

1 principal loan amount is less than twenty thousand dollars  
2 (\$20,000), an amount equal to the lesser of one thousand  
3 dollars (\$1,000) or eight percent of the total principal loan  
4 amount. "

5 SECTION 4. [NEW MATERIAL] PROHIBITED PRACTICES AND  
6 PROVISIONS REGARDING HOME LOANS. --

7 A. No creditor shall finance, directly or  
8 indirectly, credit life, credit disability, credit unemployment  
9 or credit property insurance, or any other life or health  
10 insurance, or any payments directly or indirectly for any debt  
11 cancellation or suspension agreement or contract, provided that  
12 nothing in this subsection prohibits the payment or receipt of  
13 insurance premiums or debt cancellation or suspension fees  
14 calculated on the unpaid balance of a home loan and paid on a  
15 monthly basis or prohibits bona fide credit property insurance  
16 required by the federal housing administration or the United  
17 States department of agriculture to be paid in a single premium  
18 to the respective federal agency. As used in this subsection,  
19 "credit property insurance" means property insurance written in  
20 connection with credit transactions under which the creditor is  
21 the primary beneficiary.

22 B. No creditor shall engage in the practice of  
23 flipping a home loan. As used in this subsection, "flipping a  
24 home loan" means the making of a home loan to a borrower that  
25 refinances an existing home loan when the new loan does not

1 have reasonable, tangible net benefit to the borrower  
 2 considering all of the circumstances, including the terms of  
 3 both the new and refinanced loans, the cost of the new loan and  
 4 the borrower's circumstances.

5 C. No creditor shall fail to provide access to the  
 6 same loan products at the same rates to similarly situated  
 7 borrowers, without regard to which affiliate, broker or lender  
 8 the borrower approaches or is approached by.

9 SECTION 5. [NEW MATERIAL] LIMITATIONS AND PROHIBITED  
 10 PRACTICES FOR HIGH-COST HOME LOANS. --

11 A. No creditor making a high-cost home loan shall  
 12 directly or indirectly finance any points or fees.

13 B. No creditor shall make a high-cost home loan  
 14 that contains a scheduled payment that is more than twice as  
 15 large as the average of earlier scheduled payments, provided  
 16 that this provision does not apply when the payment schedule is  
 17 adjusted to the seasonal or irregular income of a borrower.

18 C. No creditor shall make a high-cost home loan  
 19 that includes payment terms under which the outstanding  
 20 principal balance will increase at any time over the course of  
 21 the loan because the regular periodic payments do not cover the  
 22 full amount of interest due.

23 D. No creditor shall make a high-cost home loan  
 24 that contains a provision that increases the interest rate  
 25 after default, provided that this provision does not apply to

. 146755. 1

1 interest rate changes in a variable rate loan otherwise  
2 consistent with the provisions of the loan documents if the  
3 change in the interest rate is not triggered by the event of  
4 default or the acceleration of the indebtedness.

5 E. No creditor shall make a high-cost home loan  
6 that includes terms under which more than two periodic payments  
7 required under the loan are consolidated and paid in advance  
8 from the loan proceeds provided to the borrower.

9 F. No creditor shall make a high-cost home loan  
10 that may be subject to a mandatory arbitration clause that  
11 limits in any way the right of the borrower to seek relief  
12 through the judicial process for any and all claims and  
13 defenses the borrower may have against the creditor, broker or  
14 other party involved in the loan transaction.

15 G. No creditor shall make a high-cost home loan  
16 without first receiving certification from a counselor approved  
17 by the United States department of housing and urban  
18 development, the New Mexico mortgage finance authority or the  
19 director of the financial institutions division of the  
20 regulation and licensing department that the borrower has  
21 received counseling on the advisability of the loan  
22 transaction.

23 H. No creditor shall make a high-cost home loan  
24 without due regard to repayment ability. A creditor who  
25 follows debt-to-income ratios and the residual income

1 guidelines established by rule of the financial institution  
2 division of the regulation and licensing department shall  
3 benefit from a rebuttable presumption that the creditor made  
4 the loan with due regard to repayment ability.

5 I. No creditor shall pay a contractor under a home-  
6 improvement contract from the proceeds of a high-cost home loan  
7 unless:

8 (1) the creditor is presented with a signed  
9 and dated completion certificate showing that the home  
10 improvements have been completed; and

11 (2) the instrument is payable jointly to the  
12 borrower and the contractor, or, at the election of the  
13 borrower, through a third-party escrow agent in accordance with  
14 terms established in a written agreement signed by the  
15 borrower, the creditor and the contractor prior to the  
16 disbursement.

17 J. No creditor shall charge a borrower any fees or  
18 other charges, other than those that are bona fide, reasonable  
19 and actual, to modify, renew, extend or amend a high-cost home  
20 loan.

21 K. No creditor shall charge a borrower more than  
22 seventy-five dollars (\$75.00) to defer any payment due under  
23 the terms of a high-cost home loan.

24 L. No creditor shall recommend or encourage default  
25 on an existing loan or other debt prior to and in connection

. 146755. 1

1 with the closing or planned closing of a high-cost home loan  
2 that refinances all or any portion of the existing loan or  
3 debt.

4 M No creditor shall make a high-cost home loan  
5 that provides for a late payment fee except as follows:

6 (1) the late payment fee shall not be in  
7 excess of five percent of the amount of the payment past due;

8 (2) the late payment fee shall only be  
9 assessed for a payment past due for fifteen days or more;

10 (3) the late payment fee shall not be imposed  
11 more than once with respect to a single late payment and no  
12 late payment fee shall be charged with respect to a subsequent  
13 payment that would have been a full payment but for the  
14 previous default or the imposition of the previous late payment  
15 fee;

16 (4) no late payment fee shall be charged  
17 unless the creditor notifies the borrower within forty-five  
18 days following the date the payment was due that a late payment  
19 fee has been imposed for a particular late payment. A late  
20 payment fee that the creditor has collected shall be reimbursed  
21 if the borrower presents proof of having made a timely payment;  
22 and

23 (5) a creditor shall treat each payment as  
24 posted on the same business day as it was received by the  
25 creditor, service, creditor's agent or at the address provided

1 to the borrower by the creditor, service or the creditor's  
2 agent for making payments.

3 N. No creditor shall make a high-cost home loan  
4 that contains a provision that permits the creditor, in its  
5 sole discretion, to accelerate the indebtedness, provided that  
6 this provision does not prohibit acceleration of a loan in good  
7 faith due to a borrower's failure to abide by the material  
8 terms of the loan.

9 O. No creditor shall make a high-cost home loan  
10 that contains a provision that requires a penalty or premium  
11 for prepayment of the balance of the indebtedness.

12 P. A creditor shall not make a high-cost home loan  
13 unless the creditor has given the following notice, or a  
14 substantially similar notice, in writing, to the borrower,  
15 acknowledged in writing and signed by the borrower not later  
16 than the time the notice is required under the notice provision  
17 contained in 12 C. F. R. s. 226. 31(c):

18 **NOTICE TO BORROWER**

19 **YOU SHOULD BE AWARE THAT YOU MIGHT BE ABLE TO OBTAIN A**  
20 **LOAN AT A LOWER COST. YOU SHOULD SHOP AROUND AND COMPARE LOAN**  
21 **RATES AND FEES. MORTGAGE LOAN RATES AND CLOSING COSTS AND FEES**  
22 **VARY BASED ON MANY FACTORS, INCLUDING YOUR PARTICULAR CREDIT**  
23 **AND FINANCIAL CIRCUMSTANCES, YOUR EMPLOYMENT HISTORY, THE LOAN-**  
24 **TO-VALUE REQUESTED AND THE TYPE OF PROPERTY THAT WILL SECURE**  
25 **YOUR LOAN. THE LOAN RATE AND FEES COULD ALSO VARY BASED ON**

. 146755. 1

1 WHICH CREDITOR OR BROKER YOU SELECT.

2 IF YOU ACCEPT THE TERMS OF THIS LOAN, THE CREDITOR WILL  
3 HAVE A MORTGAGE LIEN ON YOUR HOME. YOU COULD LOSE YOUR HOME  
4 AND ANY MONEY YOU PUT INTO IT IF YOU DO NOT MEET YOUR PAYMENT  
5 OBLIGATIONS UNDER THE LOAN.

6 YOU SHOULD CONSULT AN ATTORNEY-AT-LAW AND A QUALIFIED  
7 INDEPENDENT CREDIT COUNSELOR OR OTHER EXPERIENCED FINANCIAL  
8 ADVISOR REGARDING THE RATE, FEES AND PROVISIONS OF THIS  
9 MORTGAGE LOAN BEFORE YOU PROCEED. A LIST OF QUALIFIED  
10 COUNSELORS IS AVAILABLE BY CONTACTING THE NEW MEXICO REGULATION  
11 AND LICENSING DEPARTMENT.

12 YOU ARE NOT REQUIRED TO COMPLETE THIS LOAN AGREEMENT  
13 MERELY BECAUSE YOU HAVE RECEIVED THIS DISCLOSURE OR HAVE SIGNED  
14 A LOAN APPLICATION. REMEMBER, PROPERTY TAXES AND HOMEOWNER'S  
15 INSURANCE ARE YOUR RESPONSIBILITY. NOT ALL CREDITORS PROVIDE  
16 ESCROW SERVICES FOR THESE PAYMENTS. YOU SHOULD ASK YOUR  
17 CREDITOR ABOUT THESE SERVICES.

18 ALSO, YOUR PAYMENTS ON EXISTING DEBTS CONTRIBUTE TO YOUR  
19 CREDIT RATINGS. YOU SHOULD NOT ACCEPT ANY ADVICE TO IGNORE  
20 YOUR REGULAR PAYMENTS TO YOUR EXISTING CREDITORS.

21 SECTION 6. [NEW MATERIAL] DEFAULT--NOTICE--RIGHT TO  
22 CURE. --

23 A. Before an action is filed to foreclose or  
24 collect money due pursuant to a home loan or before other  
25 action is taken to seize or transfer ownership of property

1 subject to a home loan, the creditor or creditor's assignee of  
2 the loan shall deliver to the borrower a notice of the right to  
3 cure the default informing the borrower of:

4 (1) the nature of the default;

5 (2) the borrower's right to cure the default  
6 by paying the sum of money required, provided that a creditor  
7 or assignee shall accept any partial payment made or tendered  
8 in response to the notice. If the amount necessary to cure the  
9 default will change within thirty days of the notice, due to  
10 the application of a daily interest rate or the addition of  
11 late fees, as allowed by the Home Loan Protection Act, the  
12 notice shall give sufficient information to enable the borrower  
13 to calculate the amount at any point within the thirty-day  
14 period;

15 (3) the date by which the borrower may cure  
16 the default to avoid a court action, acceleration and  
17 initiation of foreclosure or other action to seize the  
18 property, which date shall not be less than thirty days after  
19 the date the notice is delivered, and the name and address and  
20 telephone number of a person to whom the payment or tender  
21 shall be made;

22 (4) that if the borrower does not cure the  
23 default by the date specified, the creditor or assignee may  
24 file an action for money due or take steps to terminate the  
25 borrower's ownership in the property by requiring payment in

. 146755. 1

1 full of the home loan and commencing a foreclosure proceeding  
2 or other action to seize the property; and

3 (5) the name and address and the telephone  
4 number of a person whom the borrower may contact if the  
5 borrower disagrees with the assertion that a default has  
6 occurred or the correctness of the calculation of the amount  
7 required to cure the default.

8 B. If a creditor or assignee asserts that grounds  
9 for acceleration exist and requires the payment in full of all  
10 sums secured by the home loan, the borrower, or anyone  
11 authorized to act on the borrower's behalf, may, at any time  
12 prior to the time title is transferred by means of foreclosure,  
13 by judicial proceeding and sale or otherwise, cure the default,  
14 and reinstate the home loan. Cure of the default shall  
15 reinstate the borrower to the same position as if the default  
16 had not occurred and shall nullify, as of the date of the cure,  
17 an acceleration of any obligation under the home loan arising  
18 from the default.

19 C. To cure a default under this section, a borrower  
20 shall not be required to pay any charge, fee or penalty  
21 attributable to the exercise of the right to cure a default,  
22 other than the fees specifically allowed by this subsection.  
23 The borrower shall not be liable for any attorney fees relating  
24 to the default that are incurred by the creditor or assignee  
25 prior to or during the thirty-day period set forth in

1 Subsection A of this section, nor for any such fees in excess  
 2 of one hundred dollars (\$100) that are incurred by the creditor  
 3 or assignee after the expiration of the thirty-day period but  
 4 prior to the time the creditor or assignee files a foreclosure  
 5 or other judicial action or takes other action to seize or  
 6 transfer ownership of the real estate. After the creditor or  
 7 assignee files a foreclosure or other judicial action or takes  
 8 other action to seize or transfer ownership of the real estate,  
 9 the borrower shall only be liable for attorney fees that are  
 10 reasonable and actually incurred by the creditor or assignee,  
 11 based on a reasonable hourly rate and a reasonable number of  
 12 hours.

13 D. If a default is cured prior to the initiation of  
 14 any action to foreclose or to seize the residence, the creditor  
 15 or assignee shall not institute a proceeding or other action  
 16 for that default. If a default is cured after the initiation  
 17 of any action, the creditor or assignee shall take such steps  
 18 as are necessary to terminate the action.

19 E. A creditor or a creditor's assignee of a home  
 20 loan that has the legal right to foreclose shall, in a  
 21 foreclosure, use the judicial foreclosure procedures provided  
 22 by law. In such a proceeding, the borrower may assert the  
 23 nonexistence of a default and any other claim or defense to  
 24 acceleration and foreclosure, including any based on a  
 25 violation of the Home Loan Protection Act, though no such claim

. 146755. 1

1 or defense shall be deemed a compulsory counterclaim.

2 Section 7. [NEW MATERIAL] CLAIMS AGAINST CERTAIN  
3 SELLERS. -- Notwithstanding any other provision of law, if a home  
4 loan is made, arranged or assigned by a person selling a  
5 manufactured home to a borrower or selling home improvements on  
6 the residence of a borrower, the borrower may assert all  
7 affirmative claims and defenses that the borrower may have  
8 against the seller or home improvement contractor against a  
9 creditor or a holder or service of the home loan, in any  
10 capacity.

11 Section 8. [NEW MATERIAL] SUBTERFUGE PROHIBITED. -- No  
12 person shall, with the intent to avoid the application or  
13 provisions of the Home Loan Protection Act:

- 14 A. divide a loan transaction into separate parts;  
15 B. structure a home loan transaction as an open-end  
16 loan when the loan would have been a high-cost home loan if the  
17 loan had been structured as a closed-end loan; or  
18 C. perform any other subterfuge.

19 Section 9. [NEW MATERIAL] CIVIL ACTION. --

- 20 A. A borrower harmed by a violation of the Home  
21 Loan Protection Act may bring a civil action to recover:  
22 (1) actual damages, including consequential  
23 and incidental damages;  
24 (2) statutory damages equal to the finance  
25 charges agreed to in the home loan agreement, plus ten percent

1 of the amount financed;

2 (3) punitive damages, when the violation was  
3 malicious or reckless;

4 (4) costs and reasonable attorney fees;

5 (5) injunctive, declaratory and such other  
6 equitable relief as the court deems appropriate in an action to  
7 enforce compliance with the Home Loan Protection Act; and

8 (6) rescission of the home loan. If  
9 rescinded, the home loan agreement shall be void, and the  
10 creditor or the creditor's assignee shall have no right to  
11 collect, receive or retain any principal, interest or other  
12 charges whatsoever with respect to the loan, and the borrower  
13 may recover any payments made under the agreement.

14 B. The civil action and remedies provided in this  
15 section are not exclusive and are in addition to any other  
16 action or remedies available to a borrower under applicable  
17 law.

18 C. A creditor is not liable in an action brought  
19 pursuant to this section if:

20 (1) within thirty days of the home loan  
21 closing and prior to receiving any notice from the borrower of  
22 the violation, the creditor has made appropriate restitution to  
23 the borrower, and appropriate adjustments are made to the loan;  
24 or

25 (2) the violation was not intentional and

1 resulted from a bona fide error in fact notwithstanding the  
2 maintenance of procedures reasonably adopted to avoid such  
3 errors and within sixty days of the loan closing and prior to  
4 receiving any notice from the borrower of the violation, the  
5 borrower is notified of the violation, appropriate restitution  
6 is made to the borrower and appropriate adjustments are made to  
7 the loan.

8 Section 10. [NEW MATERIAL] PREEMPTION. -- Counties and  
9 municipalities, including home rule counties and  
10 municipalities, are prohibited from enacting and enforcing  
11 ordinances, resolutions or rules regulating financial or  
12 lending activities or imposing reporting requirements or any  
13 other obligations upon creditors regarding home loans that are  
14 subject to the Home Loan Protection Act.

15 Section 11. [NEW MATERIAL] ACTIONS BASED ON HOME LOANS. --

16 A. Notwithstanding any other provision of law, any  
17 person who purchases or is otherwise assigned a high-cost home  
18 loan shall be subject to all affirmative claims and any  
19 defenses with respect to the loan that the borrower could  
20 assert against the original creditor of the loan; provided that  
21 this section shall not apply if the purchaser or assignee  
22 demonstrates by a preponderance of the evidence that a  
23 reasonable person exercising reasonable due diligence could not  
24 determine that the mortgage was a high-cost home loan. It  
25 shall be presumed that a purchaser or assignee has exercised

1 such due diligence if the purchaser or assignee:

2 (1) has in place at the time of the  
3 acquisition of the subject loan, policies that expressly  
4 prohibit its purchase or acceptance of an assignment of any  
5 high-cost home loan;

6 (2) requires by contract that a seller or  
7 assignor of the home loan to the purchaser or assignee  
8 represents and warrants to the purchaser or assignee that  
9 either:

10 (a) the seller or assignor will not sell  
11 or assign any high-cost home loan to the purchaser or assignee;  
12 or

13 (b) that such seller or assignor is the  
14 beneficiary of such a representation and warranty from a  
15 previous seller or assignor; and

16 (3) exercises reasonable due diligence at the  
17 time of the acquisition of the home loan, or within a  
18 reasonable period of time thereafter, intended to determine  
19 that the home loan is not a high-cost home loan; or

20 (4) satisfies the requirements in Paragraphs  
21 (1) and (2) of this subsection and establishes that a  
22 reasonable person exercising ordinary due diligence could not  
23 determine, based on the documentation received in the normal  
24 course of business and the itemization of the amount financed  
25 and other disclosure disbursements, that the loan was a high-

. 146755. 1

1 cost home loan.

2 B. Notwithstanding any other law to the contrary, a  
3 borrower acting only in an individual capacity may assert  
4 against the creditor or any subsequent holder or assignee of  
5 the home loan:

6 (1) within six years of the closing of a home  
7 loan, a violation of the Home Loan Protection Act in connection  
8 with the loan as an original action or as a defense, claim or  
9 counterclaim after an action to collect on the home loan or  
10 foreclose on the collateral securing the home loan has been  
11 initiated or the debt arising from the home loan has been  
12 accelerated or the home loan has become sixty days in default;  
13 or

14 (2) at any time during the term of a high-cost  
15 home loan, a violation of the Home Loan Protection Act in  
16 connection with the loan as a defense, claim or counterclaim  
17 after an action to collect on the home loan or foreclose on the  
18 collateral securing the home loan has been initiated or the  
19 debt arising from the home loan has been accelerated or the  
20 home loan has become sixty days in default.

21 C. In an action, claim or counterclaim brought  
22 pursuant to Subsection B of this section, the borrower may  
23 recover only amounts required to reduce or extinguish the  
24 borrower's liability under the home loan plus amounts required  
25 to recover costs and reasonable attorney fees.

. 146755. 1

1           D. Nothing in this section shall limit the  
2 substantive rights, remedies or procedural rights available to  
3 a borrower against a creditor, assignee or holder that are  
4 otherwise provided by law.

5           Section 12. [NEW MATERIAL] APPLICATION OF UNFAIR  
6 PRACTICES ACT. -- A violation of the Home Loan Protection Act  
7 constitutes an unfair or deceptive trade practice pursuant to  
8 the Unfair Practices Act.

9           Section 13. [NEW MATERIAL] ATTORNEY GENERAL-- ENFORCEMENT  
10 OF RULES. -- The financial institution division of the regulation  
11 and licensing department shall enforce the provisions of the  
12 Home Loan Protection Act and, after consulting with the  
13 attorney general and considering similar rules of the federal  
14 housing administration and the federal department of veterans  
15 affairs, shall adopt rules required pursuant to Subsection H of  
16 Section 5 of the Home Loan Protection Act and such other rules  
17 as are necessary to implement that act.

18           Section 14. [NEW MATERIAL] LIBERAL INTERPRETATION. -- The  
19 Home Loan Protection Act shall be liberally construed to carry  
20 out its purpose.

21           Section 15. Section 58-7-9 NMSA 1978 (being Laws 1959,  
22 Chapter 327, Section 10, as amended) is amended to read:

23           "58-7-9. CONSTRUCTION. --

24           A. None of the provisions of the New Mexico Small  
25 Loan Act of 1955 are amended or repealed by the New Mexico Bank

. 146755. 1

1 Installment Loan Act of 1959.

2 B. With the exception of precomputed loan  
3 transactions, a lender is not bound by the provisions of the  
4 New Mexico Bank Installment Loan Act of 1959 in making loans  
5 where the loan is made in accordance with the provisions of  
6 Sections 56-8-9 through 56-8-14 NMSA 1978.

7 C. None of the provisions of the New Mexico Bank  
8 Installment Loan Act of 1959 apply to the assignment or  
9 purchase of retail installment contracts originated under the  
10 provisions of Sections 58-19-1 through 58-19-14 NMSA 1978 or  
11 originated under the provisions of Sections 56-1-1 through  
12 56-1-15 NMSA 1978.

13 D. In the event of a conflict between a requirement  
14 of the New Mexico Bank Installment Loan Act of 1959 and a  
15 requirement of the Home Loan Protection Act, the requirement of  
16 the Home Loan Protection Act shall control.

17 ~~[D.]~~ E. As used in the New Mexico Bank Installment  
18 Loan Act of 1959:

19 (1) "year" means three hundred sixty-five  
20 days; and

21 (2) "month" means one-twelfth of a year [~~and~~

22 ~~(3) "day" means one-three-hundred-sixty-fifth~~  
23 ~~of a year].~~

24 ~~[E.]~~ F. The director of the financial institutions  
25 division of the regulation and licensing department [~~is~~

1 ~~empowered and directed to~~ shall issue and file as required by  
 2 law interpretive regulations to effectuate the purposes of the  
 3 New Mexico Bank Installment Loan Act of 1959. In issuing,  
 4 amending or repealing interpretive regulations, the director  
 5 shall issue the regulation amendment or repeal of the  
 6 regulation as a proposed regulation amendment or repeal of a  
 7 regulation and file it for public inspection in the office of  
 8 the director of the financial institutions division.  
 9 Distribution thereof shall be made to interested persons, and  
 10 their comments shall be invited. After the proposed regulation  
 11 has been on file for not less than two months, the director may  
 12 issue it as a final regulation by filing as required by law.  
 13 Any person who is or may be adversely affected by the adoption,  
 14 amendment or repeal of a regulation under this section may file  
 15 an appeal of that action in the district court in Santa Fe  
 16 county within thirty days after the filing of the adopted  
 17 regulation, amendment or repeal as required by law.

18 ~~[F.]~~ G. Any person, corporation or association  
 19 complying with the regulations adopted by the director of the  
 20 financial institutions division of the regulation and licensing  
 21 department is deemed to have complied with the provisions of  
 22 the New Mexico Bank Installment Loan Act of 1959.

23 ~~[G.]~~ H. All loans other than precomputed loan  
 24 transactions made under the New Mexico Bank Installment Loan  
 25 Act of 1959 shall be clearly identified on the loan documents

. 146755. 1

1 as being made under that act."

2 Section 16 Section 58-21-6 NMSA 1978 (being Laws 1983,  
3 Chapter 86, Section 6, as amended by Laws 2001, Chapter 251,  
4 Section 5 and by Laws 2001, Chapter 264, Section 5) is amended  
5 to read:

6 "58-21-6. PERSONS EXEMPT FROM REGISTRATION. -- The  
7 following persons shall be exempt from all provisions of the  
8 Mortgage Loan Company and Loan Broker Act:

9 A. banks, trust companies, savings and loan  
10 associations, credit unions, [~~consumer finance companies~~]  
11 insurance companies or real estate investment trusts as defined  
12 in 26 USCA 856;

13 B. an attorney licensed to practice law in New  
14 Mexico who is not principally engaged in the business of  
15 negotiating loans secured by real or personal property, when  
16 the person renders services in the course of his practice as an  
17 attorney;

18 C. a New Mexico-licensed real estate broker  
19 rendering service in the performance of his duties as a real  
20 estate broker who obtains financing for a real estate  
21 transaction involving an actual bona fide sale of real estate  
22 or real estate contract handled by the broker and who receives  
23 only the customary real estate broker's commission in  
24 connection with the transaction;

25 D. a person doing an act under order of a court;

1           E. a person making or acquiring a mortgage loan  
2 with his own funds for his own investment without the intent to  
3 resell the mortgage loan;

4           F. the United States of America, state of New  
5 Mexico or any of their branches, agencies, departments, boards,  
6 instrumentalities or institutions and all political  
7 subdivisions of the state and their agencies, instrumentalities  
8 and institutions; and

9           G. a company licensed as a small business  
10 investment company under the federal Small Business Investment  
11 Act of 1958.

12           Section 17. Section 58-21-19 NMSA 1978 (being Laws 1983,  
13 Chapter 86, Section 19, as amended by Laws 2001, Chapter 251,  
14 Section 12 and by Laws 2001, Chapter 264, Section 12) is  
15 amended to read:

16           "58-21-19. COMPLIANCE WITH FEDERAL LAW.--In connection  
17 with any loan originated, brokered, negotiated or made by a  
18 registrant pursuant to the Mortgage Loan Company and Loan  
19 Broker Act, registrants shall comply with:

- 20           A. applicable federal consumer lending laws; and  
21           B. the provisions of the Home Loan Protection Act."

22           Section 18. SEVERABILITY.--The provisions of the Home  
23 Loan Protection Act are severable, and if any part or  
24 application of that act is held invalid, the remainder or its  
25 application to other situations or persons shall not be

1 affected. If any provision of the Home Loan Protection Act is  
2 declared to be inapplicable to any specific category, type or  
3 kind of loan or points and fees, the provisions of that act  
4 shall continue to apply with respect to all other loans and  
5 points and fees.

6 Section 19. APPLICABILITY. --The Home Loan Protection Act  
7 shall apply to all home loans made or entered into after the  
8 effective date of that act.

underscored material = new  
[bracketed material] = delete

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25